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No. 88-795

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN JUDGE, JOE CHOO, AND GARY CLARK, PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the courts below erred in concluding that the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7701 *et seq.*, precludes judicial review of personnel actions that are not subject to review under the CSRA.

1. Petitioners are employees of the United States Department of Agriculture (USDA) who filed grievances with the agency in 1983 over its failure to promote them. They claimed that the agency did not promote them because it had used nonmerit factors in making its promotion decisions. After referring the grievances to an agency factfinder, the USDA adopted the factfinder's recommendation that the grievances be denied. Petitioners also complained to the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB). That Office, which is charged with investigating and rectifying pro-

hibited personnel practices, including failures to follow merit principles (5 U.S.C. 1206, 2302), rejected petitioners' claims. Pet. App. 2; Pet. 11-12.

Petitioners then brought this action, alleging that the USDA's failure to promote them, and its rejection of their grievances, violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Petitioners sought various forms of injunctive relief, including retroactive promotions. The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 7).[1] After noting that petitioners had alleged prohibited personnel practices as defined by the CSRA, the court added that OSC decisions are subject only to limited judicial review and that petitioners did not contend that the OSC's decision here was reviewable (Pet. App. 4 & n.4). The district court then rejected petitioners' contention that an agency personnel decision is subject to judicial review under the APA even though it is not reviewable under the CSRA (Pet. App. 7).[2] It instead agreed with the many courts that had held personnel decisions to be reviewable under the CSRA or not at all (Pet. App. 4-7).

The court of appeals, which had the benefit of this Court's decision in *United States* v. *Fausto,* No. 86-595 (Jan. 25, 1988), issued a brief per curiam order affirming the dismissal of petitioners' claims (Pet. App. 1).

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[1] In addition to complaining that they had not been promoted, petitioners alleged that the agency had violated the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, by refusing to disclose certain records to petitioner Gary Clark. After the district court dismissed petitioner's APA claim, petitioners moved to dismiss their FOIA claim, and the district court did so.

[2] The CSRA provides that major personnel actions, such as removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs, are appealable to the MSPB and then to the Federal Circuit. 5 U.S.C. 7512, 7513(d), 7703. Other personnel actions, including failures to promote, are generally not reviewable.

2. Petitioners contend that a personnel decision that was subject to judicial review under the APA prior to the CSRA's enactment remains so notwithstanding the CSRA's comprehensive remedial plan. However, this Court's decision in *Fausto* forecloses that argument. The plaintiff in *Fausto* was an excepted service employee (see slip op. 1-2 & n.1) who sought to bring suit under the Tucker Act and the Back Pay Act (as he could have prior to the enactment of the CSRA) because the CSRA provided him no remedy. This Court held that the CSRA precludes employees from obtaining judicial review under more general statutes because allowing review of personnel actions under those statutes would undermine the comprehensive plan set forth by Congress in the CSRA (slip op. 10-12). The Court emphasized that competitive service employees cannot expand review rights that they possess under the CSRA by resort to pre-CSRA remedies (slip op. 10 n.3).

Thus, contrary to petitioners' claims, Congress did not intend to allow federal employees to challenge personnel actions under the APA. As this Court has stated, "a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *General Services Administration,* 425 U.S. 820, 834 (1976). Congress did not create the CSRA remedial plan as an overlay upon existing forms of action. Rather, the CSRA was enacted to replace the existing patchwork system, which permitted APA review in certain circumstances, with an integrated scheme of administrative and judicial review. *Fausto,* slip op. 5-6.

As petitioners concede, almost every court to consider this issue has reached the same outcome as the court below. See *Towers* v. *Horner,* 791 F.2d 1244 (5th Cir. 1986); *Weatherford* v. *Dole,* 763 F.2d 392 (10th Cir. 1985); *Gray* v. *Office of Personnel Management,* 771 F.2d 1504 (D.C. Cir. 1984), cert. denied, 475 U.S. 1089 (1986);

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It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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